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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PARKS, Defendant and Appellant.	B285967 (Los Angeles County Super. Ct. No. PA086935)

APPEAL from judgment of the Superior Court of Los Angeles County, Hilleri G. Merrit, Judge. Affirmed.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Kristen J. Inberg, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Michael Parks guilty of six counts of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] It found true that Parks had suffered two prior convictions for serious or violent felonies within the meaning of the three strikes law (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)), suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and served seven prior prison terms (§ 667.5, subd. (b)).

Parks was sentenced to 162 years to life in prison, comprised of 6 terms of 25 years to life pursuant to the three strikes law, a 5-year enhancement pursuant to section 667, subdivision (a)(1), and 7 terms of 1 year each pursuant to section 667.5, subdivision (b).

Parks contends that: (1) the evidence is insufficient to support the trial court's finding that he voluntarily absented himself from trial; (2) the evidence is insufficient to support the jury's finding that he used a deadly weapon in the assaults; (3) the trial court erred in not instructing the jury on the lesser included offense of simple assault; (4) the jury was erroneously instructed that it could convict him of assault with a deadly weapon under an invalid legal theory;

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[1] All further statutory references are to the Penal Code unless otherwise specified.

and (5) the evidence was insufficient to support the finding that he was 16 years old at the time he committed one of his strike prior offenses.

We affirm the judgment.

FACTS[2]

On July 7, 2016, at approximately 9:00 a.m., Francisco Carrillo was driving a red Camry. His five-year-old son was in a car seat on the right rear passenger side of the car.

At the intersection of Paxton Avenue and Dronfield Avenue, Carillo prepared to make a left turn onto Dronfield Avenue. Across the intersection, Parks was turning right onto Dronfield Avenue in a blue Hyundai. Parks turned right and Carrillo turned left behind him.

Parks stopped his car. Carrillo also stopped, waited 20 to 30 seconds, and then drove around Parks. As Carrillo passed, Parks got out of the Hyundai and began screaming and gesticulating. He got back in his car and followed Carrillo. Parks stuck his head out of the car window and yelled at Carrillo. Carrillo turned left on Corcoran Street and stopped at an intersection for 20 to 30 seconds to let Parks pass him. Parks did not pass, but instead "sped up" and rear-ended the Camry, turning it "a little bit." Carrillo's son became scared and began crying. Parks drove away, and Carrillo called 911 while following Parks to get his license

[2] The facts are as presented by the prosecution, as Parks did not present evidence on his own behalf.

plate number. After a mile, Parks turned into a parking lot. Carrillo noted the license plate number and hung up his phone. Parks drove back towards Carrillo and "plowed" into the front passenger side of Carrillo's car, then reversed and crashed into the right rear passenger door of the Camry where Carrillo's son was sitting, causing him to cry and scream. Parks drove away.

Carrillo called the police and described Parks as a bald black man in his late forties or early fifties. A few weeks later, Carrillo identified Parks as the driver who hit him in a six-pack photo lineup. Carrillo described the driver as having "short, but almost no hair, white hair, and was a bit older and skinny." He stated that the photo he selected from the six-pack "replicate[d] the same picture in my head of him the day of the incident."

The Camry suffered damage to its right front side, right rear side, and rear end. Carrillo testified that the car was "totaled." Neither Carrillo nor his son suffered physical injuries. Carrillo testified that after the incident, his son no longer liked to be in the car and would rather walk.

A week after the assault, the police recovered the Hyundai. It had damage and red paint on its front bumper. Parks had rented the Hyundai from Office Budget on June 16, 2016.

DISCUSSION

Parks's Absence from Trial

Parks contends the trial court's findings that he purposely missed the bus to court and that he knowingly and intelligently waived his right to be present for the presentation of the prosecution's case are not supported by substantial evidence. The contentions are without merit.

Proceedings

The trial for the assault charges trailed Parks's trial and conviction for murder in Los Angeles Superior Court Case No. PA087400.[3] Parks attended his murder trial and the sentencing hearing that took place on September 11, 2017.

In the current case, the parties announced they were ready to proceed with the trial on Wednesday, September 27, 2017. The trial court informed the parties that jury selection would begin Thursday, and that court would adjourn early on Friday. The trial court noted, "Hopefully at that juncture we'll already have a jury, depending on where we are in the trial, either morning only, or not going past our afternoon break."

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[3] We affirmed Parks's murder conviction in *People v. Parks* (Dec. 14, 2018, B285035) [nonpub. opn.].

Later that day, the trial court recalled Parks's case after being notified that Parks was asking why he had to be present at trial. The trial court explained to Parks, "The trial will proceed with or without you. The preference is, of course, that you be here. You have a constitutional right to be here, to confront and cross-examine witnesses against you, to testify on your own behalf, if you so choose, all those constitutional rights which I know you are familiar with because we just finished a trial in here a couple of months ago with you. You have a right to all that. You have a right to be present, of course."

The court reiterated:

"[The Court:] . . . [T]he trial will occur without you, if that's your choice.

"[Parks]: I would like that.

"[The Court]: You would like what?

"[Parks]: Not to be here. Let it go without me. Pick the jury all day. I don't want to be here at all."

Defense counsel requested an express waiver, which the trial court declined. The trial court ordered Parks to be brought out for trial the next day:

"[The Court:] . . . [I]f you are not here tomorrow and the information I get from the jail is that you're refusing to come to court, it is on the record now how you feel. I'll take that as a waiver, and we'll continue on with the trial.

"[Parks]: Okay. [¶] Cool. Thank you. So I don't have to come here, right?"

The trial court explained it was ordering Parks to be brought out for trial the next day and he should be there, "but if you are not because you're refusing to come, then I'll take that as a waiver."

Later, the court recalled Parks's case a second time to address the issue. The trial court explained, "[Section] 1043[, subdivision] (b)(2) is very clear. This voluntarily absenting yourself will only be considered by the court once trial has commenced. Trial has not commenced."

The court informed Parks if he wanted a jury trial, he could not voluntarily absent himself before trial started, and if he refused to be present he would be extracted from his cell.

On Thursday, September 28, 2017, Parks was present in court. The prosecutor requested that that Parks's photo be taken, so that she could prove Parks was the person Carrillo identified if Parks did not subsequently attend trial. The trial court granted the request, and stated that if Parks refused, his refusal could be used to demonstrate consciousness of guilt. Parks refused to have his photo taken.

Later that day, the trial court recalled Parks's case to discuss his presence at trial again:

"[The Court]: Are you going to be present during your trial?

"[Parks]: I can't answer that. I don't know. Maybe I will one day, maybe I won't.

"[The Court]: I advised you under [section] 1043[, subdivision] (b)(2), should you choose to voluntarily absent yourself, the proceedings will go on. You know what is entailed in a jury trial because you just went through a jury trial in this court two months ago. [¶] It is obviously in your best interests to be here. You have a constitutional right to be here. Should you choose at any point not to be here, then the trial will proceed in your absence."

The trial court explained if Parks chose to not to be present it would amount to a waiver of his constitutional right to testify.

Parks acknowledged he understood and asked, "So can I be on the early bus to go back to the county, and leave that to my lawyer to take the jury out? I don't want to be here, point blank, period."

Citing to *People v. Lewis* (1983) 144 Cal.App.3d 267, the court explained that the function of section 1043 is to ensure that a defendant voluntarily and knowingly waives his right to be present at trial. It is enough if the defendant is physically present where the trial is to be held, understands the proceedings against him, and then confronts the court and voluntarily states he does not want to participate any further. The court verified:

"[The Court]: Is that what you're telling the Court? That you simply will not participate in your own trial?

"[Parks]: I didn't say that. Maybe one day I won't come in. Maybe one day I don't want to come in.

“[The Court]: The bottom line is you’re here now, so if you are asking to take the early bus today, the answer is no. You’re going to be here.

“[Parks]: I’m not coming inside the courtroom.

“[The Court]: So I understand, because I need the record to be clear in case anyone is ever reviewing this one day to make sure you were given every opportunity, although you’re here now in the courtroom, you’re indicating when the jury comes in, you will not be present?

“[Parks]: No, I will not.”

Citing *People v. Ruiz* (2001) 92 Cal.App.4th 162, the court explained that a waiver of presence does not have to occur after jurors have been sworn for voir dire or impaneled or after the first witness is sworn. The court stated it would admonish the jury:

“‘The defendant has a constitutional right to be present during jury trial. Mr. Parks has elected not to be present during the trial at this time. The defendant’s decision not to be present is not evidence. You are not to consider his absence for any purpose. Do not allow the defendant’s decision not to be present during trial to affect your verdict in this case.’”

The court found that it had complied with section 1043 under *Lewis* and *Ruiz* because trial had commenced. The court again asked Parks, “So, Mr. Parks, will you be present during your own jury trial?” Parks replied, “No, I will not.” The court ordered Parks escorted out of the courtroom but required that he remain in the courthouse for the rest of the day. Parks asked, "I'm not going to change my mind, so can you please send me back on the early bus?" The court denied the request.

Voir dire of the prospective jurors commenced in Parks's absence. The court admonished the jury it was not to consider Parks's absence for any purpose. After the lunch break, the court noted for the record that the bailiff asked Parks if he wanted to be present for trial, and Parks indicated he did not. Voir dire continued in Parks's absence and the jury was impaneled.

On Friday, September 29, 2017, Parks was not present at trial. The court stated:

"Mr. Parks did not avail himself of the morning bus. He indicated, according to the Sheriff's department, that he didn't hear them. They wanted him on the early bus, so he made the late bus, knowing full well, as it was made quite clear in this court, that court would be ending early today and that I had ordered the jury back for 10:00 o'clock a.m. [¶] So while Mr. Parks would appear to be playing games with his trial, he made it quite clear yesterday he didn't want to be here, but he wouldn't commit to whether or not he would be here every day, or any day. So I made it clear that I would order him out and have him extracted, if necessary, every day. [¶] So he decided he would come to court when he felt like it, knowing full well that he would miss the entire morning session. Well, that's his choice. He made it clear he doesn't want to participate. He made it clear he doesn't like being here, so I'm going to take his seeming inability to get on the morning bus to be further refusal under [section] 1043[, subdivision] (b)(2). [¶] We'll continue the proceedings without him, as I indicated I would do, and if he makes it here in time for testimony, fine. If he doesn't, that's fine, too."

Neither side objected. Trial commenced.

Prior to testimony by Detective Edward Yates, the court held an Evidence Code section 402 hearing regarding Parks's refusal to have his photo taken.

The court stated:

"Well, now the time is right, because he did not get into courtline. He indicated -- he just didn't wake up in time. He indicated -- I believe [Los Angeles County Sheriff's Department] Deputy Mendoza -- I have already made a record of this, but he stated, well, he didn't hear the wake-up call. He didn't realize he had to be on the early bus, which I find to be completely incredible because of the fact that he just went through a trial in this court two months ago. [¶] He knows exactly how trial works and he has made it very clear that he does not want to be a participant in this matter, but he is a smart enough gentleman to indicate he wasn't going to commit to not being here every day. But he wasn't going to be here yesterday. Even though he was here, he wouldn't appear in front of the jury. [¶] Now knowing the jury was coming in in the morning, he specifically chose to not get on the morning bus. So if he is here at all, it will be this afternoon."

Detective Yates testified and the People rested its case-in-chief. Prior to the lunch break, Parks arrived at the courthouse, but refused to come to the courtroom. He asked the bailiff, "'Why does the judge keep making me come to court?'"

The court noted that Parks's statement indicated that he did not want to attend trial at all, which lent further support to its decision to go forward with the trial that morning. The court found Parks waived his right to testify, and proceeded with the conference on jury instructions. It ordered Parks to be brought out for trial for Monday, October 2, 2017.

On October 2, 2017, Parks was present in custody, but refused to enter the courtroom. While the court was finalizing the jury instructions there was a loud, persistent banging. Deputy Mendoza informed the court Parks had kicked a window in his holding cell and shattered it.

Los Angeles County Sheriff's Department Sheriff's Deputy Stosic told the court Parks threatened to continue breaking things until the court no longer required him to come to the courtroom. Parks also said he did not want to talk to his attorney, he did not want to be there, and he wanted to go back to county jail. Deputy Stosic said Parks also broke two windows in the interview room with his feet. The court ordered the Sheriffs not to attempt to bring Parks to trial unless he expressed that he wanted to be present. It found that Parks was "far too destructive" to be present.

The trial continued in Parks's absence, and Parks was found guilty of six counts of assault with a deadly weapon. Parks also refused to attend his sentencing hearing, which proceeded in his absence.

<u>Law</u>

"A criminal defendant's right to be present at trial is protected under both the federal and state Constitutions. (U.S. Const., 6th & 14th Amends.; *United States v. Gagnon* (1985) 470 U.S. 522, 526; Cal. Const., art. I, § 15; *People v. Waidla* [(2000)] 22 Cal.4th [690,] 741.) 'The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, [citation], but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.' (*United States v. Gagnon*, *supra*, 470 U.S. at p. 526.) Our state Constitution guarantees that '[t]he defendant in a criminal cause has the right . . . to be personally present with counsel, and to be confronted with the witnesses against the defendant.' (Cal. Const., art. I, § 15.)" (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202 (*Gutierrez*).)

"[U]nder section 1043, subdivision (b)(2), a trial court may continue a trial in a custodial defendant's absence after the trial has commenced in the defendant's presence—without first obtaining the defendant's written or oral waiver of the right to presence—if other evidence indicates the defendant has chosen to be absent voluntarily.[4] While a defendant's express waiver in front of the judge might be the surest way of ascertaining the defendant's choice, it is not the only way. A defendant's 'consent need not be explicit. It may be implicit and turn, at least in part, on the actions of the defendant.' (*U.S. v. Watkins* (7th Cir. 1993) 983 F.2d 1413, 1420, fn. omitted; see also *People v. Medina* [(1995)] 11 Cal.4th [694,] 739.) In determining whether a custodial defendant who refuses to leave the lockup is 'voluntarily absent' (§ 1043, subd. (b)(2)), a trial court should take reasonable steps to ensure that being absent from trial is the defendant's choice." (*Gutierrez*, *supra*, 29 Cal.4th at p. 1206.)

"The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence. ([*People v.*] *Concepcion* [(2008)] 45 Cal.4th [77,] 84.) [Where] the record . . . supports the trial court's view that defendant was '"aware of the processes taking place,"' that he knew '"his right and of his obligation to be present,"' and that he had '"no sound reason for remaining away"' (*Taylor*[*v. United States* (1973)] 414 U.S. [17] 19, fn. 3) . . .

[4] Section 1043, subdivision (b)(2), provides: "The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] . . . [a]ny prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent." (fn. omitted.)

defendant [has] implicitly waived his right to be present. (*Id*. at p. 20.) No more [is] constitutionally required. (*Smith v. Mann* (2d Cir. 1999) 173 F.3d 73, 76; *Clark v. Scott* (5th Cir. 1995) 70 F.3d 386, 389–390.)" (*People v. Espinoza* (2016) 1 Cal.5th 61, 74 (*Espinoza*).)

"[The] conclusion that defendant's voluntary absence operated to waive his constitutional right to be present at trial and permitted continuation of the trial does not end our inquiry regarding the propriety of the trial court's decision to proceed with the trial in the absence of defendant . . . . Section 1043[, subdivision] (b)(2) states that a defendant's voluntary absence 'shall not prevent' the trial from continuing, but it does not require it. Accordingly, the decision whether to continue with a trial in absentia under the statute or to declare a mistrial rests within the discretion of the trial court. (Cf. *Cureton v. United States*[(D.C. Cir. 1968) 396 F.2d [671] 675 [similar language in federal rule provides courts with latitude in deciding whether to proceed].)" (*Espinoza*, *supra*, 1 Cal.5th at pp. 75–76.)

Analysis

Substantial evidence supports the trial court's finding that Parks voluntarily absented himself from the trial. There is no doubt that Parks was aware of the process taking place. He was present when the parties declared readiness for trial and the court announced the tentative schedule through the end of the week, specifically stating that it hoped to have a jury empaneled by Friday. Parks was made fully aware of his right and obligation to be present, both through his recent criminal trial and through the court's numerous admonitions. On Wednesday and Thursday, the court recalled the case three times to discuss with Parks the ongoing concern that Parks did not want to be present. The trial court emphasized Parks's right and obligation to be present, ordered him to be brought to court daily, refused his multiple requests to leave, and informed him that refusal to come to court would be construed as a waiver of his rights. Finally, Parks had no sound reason for staying away. Although the Sheriff Deputy reported that Parks said he did not hear the bell for the early bus, the trial court was not obligated to accept the statement as true. Parks fully understood that he needed to get on the morning bus from his experience during his previous trial. He stated multiple times that he did not want to be present, and refused to enter the courtroom. His occasional expressions of ambivalence were reasonably understood as attempts to manipulate the judicial process.

The trial court did not abuse its discretion by continuing with the trial in Parks's absence. The court repeatedly warned that it would view Parks's absence as a waiver of his right to be at trial. It made every effort to ascertain Parks's intentions and secure his presence. Parks's responses to the court's repeated questions regarding whether he intended to be present at trial were never affirmative, and often cagey. The court reasonably understood Parks's action of "missing" the bus as a manipulation and determined to move forward in the absence of a defendant who did not want to participate in his own trial.

Sufficiency of the Evidence that a Deadly Weapon Was Used

Parks next contends that his convictions must be reversed because there is insufficient evidence that he used the Hyundai in a manner that was likely to cause great bodily injury, which is required to establish that he used a deadly weapon in the assaults. This contention also lacks merit.

Law

Section 245, subdivision (a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment . . . ." "[A] 'deadly weapon' under section 245, subdivision (a)(1) is "'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." [Citation.] . . . In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.

[Citations.]' ([*People v.*]*Aguilar* [(1997)] 16 Cal.4th [1023,] 1028–1029.)" (*People v. Perez* (2018) 4 Cal.5th 1055, 1065 (*Perez*).)

The term "'great bodily injury'" as used in section 245 "means significant or substantial bodily injury or damage . . . ." (*People v. Duke* (1985) 174 Cal.App.3d 296, 302.) "[I]t does not refer to trivial or insignificant injury or marginal harm." (*Ibid.*) "One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on use of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 (*Aguilar*).) But, physical injuries are "'highly probative'" of the amount of force used. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065–1066.)

"Whether an object is a deadly weapon under section 245 does not turn on whether the defendant intended it to be used as a deadly weapon; a finding that he or she willfully used the object in a manner that he or she knew would probably and directly result in physical force against another is sufficient to establish the required mens rea." (*Perez*, *supra*, 4 Cal.5th at p. 1066.)

"In considering a challenge to the sufficiency of the evidence . . . we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' (*Ibid.*)" (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

Analysis

Parks specifically argues that his convictions were not supported by substantial evidence because the prosecution did not provide evidence regarding: (1) the Hyundai's speed; (2) the amount of force the Hyundai imparted when it hit the Camry; (3) Parks's intent to use the Hyundai in a more dangerous manner than he did; or (4) physical injury to the victims. He asserts that in the absence of these facts, the finding that the Hyundai was used as a deadly weapon is unsupported. We disagree with Parks's narrow view of the evidence required and conclude that the jury's finding was sufficiently supported by the record.

Although probative when present, there is no requirement that a victim suffer physical injuries, (*Aguilar*, *supra*, 16 Cal.4th at p. 1028), nor is there a requirement that the defendant intend to inflict great bodily injury. (*Perez*, *supra*, 4 Cal.5th at p. 1066). Our review focuses on the nature of the object (here, Parks's car), the manner in which it is used, and all other facts relevant to the issue that would lead a rational juror to find beyond a reasonable doubt that the object was a dangerous weapon. (*Id.* at p. 1065.)

With respect to the nature of the object, there is no question that an automobile can constitute a deadly weapon depending on the manner in which it is used. (See, e.g., *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5 [defendant drove a car at two police officers]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [defendant raced through a red light at a busy intersection and collided with another vehicle]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705 [pickup truck constituted a deadly weapon when intentionally driven at two people]; *People v. Claborn* (1964) 224 Cal.App.2d 38, 41–42 (*Claborn*) [car found to be a deadly weapon when driven directly into a parked police vehicle].) The substantial weight and power of a motor vehicle renders it capable of causing great bodily injury, and likely to cause great bodily injury if driven in a certain manner.

In regard to the manner in which the Hyundai was used here, Parks suggests that the prosecution was required to specifically quantify the speed of the vehicle and the force it exerted each time it hit the victims' car. He further asserts that to prove the speed of the Hyundai at impact required the prosecution to call an expert, which the prosecution did not do, because determining speed from evidence at the scene requires knowledge outside the common experience of the average juror. Parks cites no authority in support of the assertion that such specific evidence is required, and we know of none.

We conclude that the evidence presented was sufficient to establish that the manner in which the Hyundai was driven was likely to cause great bodily injury. Carrillo testified that the first time Parks hit the Camry both vehicles were moving and Parks accelerated forward to rear-end him, causing the Camry to turn. Carrillo testified that the second time Parks hit the Camry, Parks "plowed" into the vehicle. Carrillo testified that the third time Parks' Hyundai hit the Camry, Parks "crashed" into it. The Camry was "totaled." Photographs admitted into evidence depicted the damage to both cars. The victims' Camry had significant damage to multiple panels on the front and rear passenger side. Photographs of the front passenger side show a broken headlight, a bumper panel ripped away from the car exposing twisted metal behind the front wheel. Photographs of the rear passenger side, where Carrillo's son was seated, show a side panel collapsed inward past the bumper, a deep dent over the rear wheel, and proximity to the son's car seat just forward of the point of impact. Photographs of Parks's Hyundai show dents and a detached bumper on the front passenger side of the car, as wells as scrapes, cracks, and holes on the front bumper near a bent license plate. From Carillo's description of events and the photographic evidence of the damage to the vehicles, including the location of the damage on the victims' car, the jury could reasonably infer that the force and/or speed required to turn the Camry and to cause the damage sustained to both vehicles—i.e., the manner in which Parks drove the Hyundai—was likely to cause great bodily injury.

Finally, Parks's actions support the finding that he intended to cause great bodily injury, which is another factor we may consider. Although intent is not a necessary element of assault with a deadly weapon, "[w]hen an instrument is capable of being used in a dangerous or deadly manner and it may fairly be inferred from the evidence in a specific case that the defendant intended so to use it, its character as such a weapon is established." (*Claborn*, *supra*, 224 Cal.App.2d at p. 42.) Parks was yelling and gesticulating throughout the incidents. He hit the Camry three times in two different locations, backing up and re-positioning the car between the second and third impacts. It may be "fairly inferred" from his conduct that he intended to cause great bodily injury, which in itself is sufficient to establish that the Hyundai was a deadly weapon. (*Ibid*.)

Viewing the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the Parks's convictions for assault with a deadly weapon.

Lesser Included Offense Instruction

Parks next contends that the trial court erred in not instructing the jury on the lesser included offense of simple assault. We conclude that even if the instruction was omitted in error, it is not reasonably probable that the jury would have reached a more favorable conclusion if the simple assault instruction had been given.

Law

"""It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. (*People v. Mosher* (1969) 1 Cal.3d 379, 393; *People v. Graham* (1969) 71 Cal.2d 303, 319.) Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]' [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 (*Breverman*), abrogated on another ground by amendment of § 189.)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Accordingly, simple assault is a lesser included offense of assault with a deadly weapon if there is substantial evidence that a defendant committed the assault, but did not use a deadly weapon in its commission.

Where error has occurred, "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. . . . [S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (Cal. Const., art. VI, § 13; [*People v.*] *Watson* [(1956)] 46 Cal.2d 818, 836.)" (*Breverman*, *supra*, 19 Cal.4th at p. 165.)

Analysis

On the facts presented, we cannot conclude that it is reasonably probable the jury would have found the Hyundai was not used in a manner likely to cause great bodily injury, and thus not a deadly weapon. It cannot be disputed that a car, by nature, has sufficient weight and speed to kill or inflict great bodily injury upon the passengers of another car in a collision. There can be little doubt that the Hyundai was used as a deadly weapon. As we have discussed in detail, the prosecution offered evidence that Parks accelerated, “plowed,” and “crashed” into the Camry three separate times, at two different locations including in close proximity to Carrillo’s son in his car seat, and with sufficient force to seriously damage multiple panels on the car’s front and rear passenger side. All of the evidence presented indicates that Parks acted deliberately. In light of these facts, it is not reasonably probable that the jury would have convicted Parks only of simple assault had it been given the option.

Assault with a Deadly Weapon Instruction

Parks contends that the jury was erroneously instructed under CALCRIM No. 875 that it could convict him of assault with a deadly weapon if it found that a car was an “inherently deadly weapon,” which was not a valid legal theory. Parks argues that the error was prejudicial and therefore requires reversal. We agree that CALCRIM No. 875 states an erroneous legal theory, but conclude that the error was harmless.

To consider the six counts of assault with a deadly weapon, the jury was required to determine whether the car was a deadly weapon other than a firearm. The jury was instructed under CALCRIM No. 875 that: “*A deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (Italics in original.)

"An 'inherently deadly or dangerous' weapon is a term of art describing objects that are deadly or dangerous in 'the ordinary use for which they are designed,' that is, weapons that have no practical nondeadly purpose. ([*Perez*, *supra*,] 4 Cal.5th [] at p. 1065.)" (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318–319 (*Stutelberg*).) The jury was not instructed regarding this definition.

We agree with the parties that automobiles are designed for a nondeadly purpose—transportation—and are therefore not inherently deadly. (See *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054 ["[o]bjects which are not inherently dangerous but which have been found to be a deadly weapon include . . . an automobile"].) It was therefore error to instruct the jury regarding this invalid legal theory.[5] (See *People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1153, review granted July 5, 2018, S248105 (*Aledamat*) [error to give inherently deadly weapon instruction because box cutter not inherently deadly as a matter of law]; *Stutelberg*, *supra*, at pp. 318–319 [same].)

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[5] There is no dispute that, in addition to the invalid legal theory (i.e., the inherently deadly theory), the jury instruction also included a valid legal theory (i.e., "*A deadly weapon other than a firearm* is any object, instrument, or weapon . . . that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.")

The question is whether the error was prejudicial. In *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*), the Supreme Court held that an erroneous instruction on an invalid legal theory is harmless "[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary [to support the valid legal theory]." (*Id.* at p. 1205.) Applying that standard, we hold that the instructional error was harmless.[6]

Here, the prosecution presented one theory of guilt: that Parks used the car as a deadly weapon, driving it in a manner likely to cause death or great bodily injury to the victims. In closing argument, the prosecutor wholly ignored the portion of CALCRIM No. 875 that instructed the jury it could convict Parks of assault with a deadly weapon if it found that a car was an inherently deadly weapon. The prosecutor instead emphasized the portion of the definition focused on the manner of use: "[the] important part of [the instruction] is [that] a deadly weapon is defined at the bottom as any object or instrument that's likely to cause great bodily injury or death." The prosecutor explained that it was not necessary for the victims to have been injured to

[6] The correct standard for evaluating prejudice for such instructional error is an issue upon which decisions of the Courts of Appeal conflict. (Compare *Aledamat*, *supra*, 20 Cal.App.5th 1149 with *Stutelberg*, *supra,* 29 Cal.App.5th 314.) Our Supreme Court has granted review to resolve the issue. (*Aledamat*, *supra*, review granted July 5, 2018, S248105.) We need not resolve this dispute, as our decision is guided by *Chun, supra,* 45 Cal.4th 1172.

prove assault with a deadly weapon, and gave an example of use of a vehicle in a deadly manner: "Driving a car and aiming it at a group of people and not having an intended target in that group of people, and driving your car right through them, even though everyone jumps away, that's an example of assault with a deadly weapon, to wit, a vehicle, an automobile."

There was no evidence offered to demonstrate that the Hyundai was inherently deadly regardless of the way in which it was used, and neither party argued that a car is an inherently deadly weapon. The prosecution presented evidence that the Hyundai was used in a manner that was capable of causing and likely to cause death or great bodily injury through the victim's testimony and photographs of the damage to the car. The defense did not refute that the Hyundai was used as a deadly weapon; it relied solely on a theory of mistaken identity. The jury had only to decide whether Parks was the driver of the Hyundai, and whether the way in which the Hyundai was used was capable of producing and likely to produce death or great bodily injury. Under these circumstances, we conclude that other aspects of the evidence leave no reasonable doubt that the jury did not rely on the invalid theory that a car is an "inherently deadly weapon" to reach its verdict.

Juvenile Adjudication

Parks contends his juvenile adjudication for robbery should not have been used as a prior strike conviction because the People failed to prove he was at least 16 years old at the time he committed the offense, as required by sections 667, subdivision (d)(3)(A), and 1170.12, subdivision (b)(3)(A). He also contends the juvenile adjudication cannot be used to enhance his sentence because a jury did not determine the facts underlying the adjudicated offense.

<u>Proceedings</u>

Parks exercised his right to a jury trial on his prior convictions. The jury found all of the prior convictions allegations true.

The trial court incorporated its findings from the bench trial in Parks's murder case when determining Parks' identity for purposes of the prior conviction enhancements.[7]

In a bifurcated bench trial in the murder case, the trial court found true the allegations that Parks had suffered two prior strike convictions (§§ 667, subd. (d) & 1170.12, subd. (b)), a prior serious felony (§ 667, subd. (a)(1)) and seven prior prison terms (§ 667.5, subd. (b)). As was the case here,

[7] We have taken judicial notice of the Reporter's and Clerk's Transcripts for the bench trial on Parks's prior convictions in the murder case.

one of the strike priors was based on Parks's 1985 juvenile robbery adjudication in Case No. J824368.

In the murder case, the prosecution provided written records referencing Parks's prior convictions and juvenile adjudication, which were designated as court exhibits and moved into evidence. The defense stipulated to the truth of these documents in Parks's jury trial on his prior convictions in the present case.

Court Exhibit No. 1 was a California Law Enforcement Telecommunication System (CLETS) report stating Parks's date of birth as March 17, 1969, but also stating his date of birth as August 7, 1973.

Court Exhibit No. 2 was California Department of Corrections and Rehabilitation (CDCR) documentation. The documentation included abstracts of judgment from March 2005 and October 2015, and a fingerprint card, reflecting Parks's date of birth as March 17, 1969. Abstracts of judgment from February 2005 and October 2014, and another fingerprint card, indicated Parks's date of birth as August 7, 1973.

Court Exhibit No. 3 was the juvenile court petition for the robbery (Case No. J824368). It stated Parks's date of birth as March 17, 1969, and indicated that he was 16 years of age on March 17, 1985. The petition alleged that Parks committed robberies on October 14, 1985 (count 1) and October 15, 1985 (count 2).

Court Exhibit No. 4 included the disposition of arrest and court action for the juvenile robbery case indicating

Parks's date of birth as March 17, 1969. A booking and identification card also indicated the March 17, 1969 date of birth.

Court Exhibit No. 5 consisted of a booking photograph, dated October 22, 1985, a completed Los Angeles Police Department "Photography Unit Order Form," and a letter from the Los Angeles County District Attorney's Office requesting certified copies of the photograph, fingerprints of 5.1 thumb prints, and disposition of arrest and court action for Parks. The letter included the case number (Case No. PA087400), booking number, prior case number (Case No. J824368), CII/SID number, and Parks's date of birth as March 17, 1969.

Court Exhibit No. 6 contained four minute orders for Case No. J824368, all indicating Parks's birth date as March 17, 1969, and the date of the juvenile petition as October 23, 1985. The minute order from October 24, 1985, stated that the count 1 robbery charge in the October 1985 petition was found true and that the petition was sustained. The minute order from November 5, 1985, also stated that Parks's birthdate was "as shown in the petition" and indicated that the robbery was a felony.

Court Exhibit No. 8 was a document which referenced Parks's juvenile adjudication for robbery in Case No. J824368 and indicated his date of birth as March 17, 1969. The document was certified by the Supervisor of the Ward Master File Unit of the Division of Juvenile Justice of the CDCR.

In both the prior and present cases, the court found the 1985 juvenile adjudication for robbery qualified as a strike conviction under the three strikes law.

Law

Section 667, subdivision (d)(3), provides, "A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code . . . . [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

Similarly, section 1170.12, subdivision (b)(3), provides: "A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for the purposes of sentence enhancement if: [¶] (A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and [¶] (B) The prior offense is [¶] (i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or [¶] (ii) listed in this subdivision as a serious and/or violent felony, and [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082 (*Miles*); *People v. Tenner* (1993) 6 Cal.4th 559, 566.) When reviewing whether the People have proved a sentence enhancement, "we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*Miles*, *supra*, at p. 1083.)

Robbery is an offense listed in Welfare and Institutions Code section 707, subdivision (b)(3).

Analysis

Parks relies on the Supreme Court's holding in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) that "[w]hile a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Id.* at p. 124.) Parks contends that the court was limited to considering the "record of conviction" to determine if the People had proved he had suffered a qualifying prior strike adjudication. He argues that the record of conviction contained only the juvenile petition stating his date of birth and the date of the robbery, neither of which were elements of the offense. Thus, neither his birth date nor the date of the offense had been found true by the juvenile court beyond a reasonable doubt.[8]

Gallardo held, "a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 136.) However, neither Parks's date of birth nor the date of commission of the robbery is part of "the nature and circumstances of the underlying conduct," (*People v. Martinez* (2000) 22 Cal.4th 106, 117), or the "'nature or basis'" of the underlying conduct that to led the prior conviction (*Gallardo*, *supra*, at p. 136). Proving the date of a defendant's birth and the date of the offense, like proving the defendant's identity, does not

[8] It is undisputed that Parks was found fit to be dealt with under juvenile court law and, thereafter, was adjudged a ward of the juvenile court pursuant to Welfare and Institutions Code section 602 for committing robbery.

involve relitigating the circumstances of a crime committed many years ago or implicate double jeopardy or speedy trial concerns, as is the case where the basis of the conviction is concerned. Accordingly, the trial court here properly looked to the exhibits taken into evidence to determine Parks was at least 16 years old at the time of the robbery. (See also *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1476 [record-of-conviction limitation only applies "where the question is the *substance* of the prior conviction (i.e., the nature of the conduct giving rise to it")].)

With respect to whether substantial evidence of Parks's age was presented, the exhibits contain multiple documents indicating a birth date of March 17, 1969. The juvenile petition reflected the date of the robbery as October 14, 1985, at which time Parks would have been 16 years old. Substantial evidence supports the trial court's finding.

DISPOSITION

We affirm the trial court's judgment.

MOOR, J.

We concur:

RUBIN, P.J.

BAKER, J.